

BEFORE THE  
POSTAL REGULATORY COMMISSION  
WASHINGTON, D.C. 20268-0001

REQUEST TO ADD  
PRIVATE ADDRESS FORWARDING  
TO THE MARKET DOMINANT PRODUCT LIST

Docket No. MC2013-60

REPLY OF THE UNITED STATES POSTAL SERVICE  
TO PETITIONER'S PLEADINGS DATED DECEMBER 20, 23 AND 26  
(January 6, 2014)

The United States Postal Service hereby submits its reply to Petitioner's pleading filed on December 20, 2013,<sup>1</sup> as supplemented by his December 23, 2013 Addendum to Closing Motion, and his second Addendum to Closing Motion dated December 26, 2013. For the reasons stated below and in its earlier pleadings in this docket,<sup>2</sup> the Postal Service respectfully submits that the Commission should act under 39 C.F.C. § 3020.55(b) and reject Petitioner's September 18, 2013, request for initiation of proceedings to consider adding the *Private Address Forwarding* (PAF) product concept to the Mail Classification Schedule. In the alternative, the Commission should act under 39 C.F.R.

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<sup>1</sup> Petitioner's Motion for Declarations, Further Proceedings, Disclosure, And Appearance; Or In The Alternative, For Suspension Pending FOIA Appeals (hereinafter, "Petitioner's December 20th Motion"). Hereinafter, each Addendum submitted by Petitioner will be referenced by its filing date, December 23<sup>rd</sup> or 26<sup>th</sup>.

<sup>2</sup> Comments of the USPS In Response To Notice And Order Concerning Request To Add Private Address Forwarding To The Market Dominant Product List (October 16, 2013) (hereinafter, "USPS October 16<sup>th</sup> Comments"; and Reply of the USPS to Comments In Response to Request To Add Private Address Forwarding To The Market Dominant Product List (December 20, 2013) (hereinafter, "USPS December 20<sup>th</sup> Reply").

§ 3020.56(c) in declining to institute further proceedings. In addition, the Commission should deny the requests for relief enumerated at pages 2-3 of Petitioners' December 20<sup>th</sup> Motion.

**I. Petitioner's Views Reflect A Fundamental Misunderstanding Of Postal Law**

**A. Petitioner Is Mistaken About The Scope Of The Postal Service's Section 403(a) Authority**

Petitioner's view of the Commission's statutory responsibilities and how it should respond to his request are rooted in his belief that the 2006 enactment of section 39 U.S.C. § 3642(a) all but nullifies 39 U.S.C. § 403(a) and, in response to mail user proposals to amend the Mail Classification Schedule, relegates the Postal Service to the limited role of planning and developing the implementation of postal products approved by the Commission. See Petitioner's December 20<sup>th</sup> Motion at 6.

Petitioner might take a different view of Title 39 if he were to review the *Historical and Statutory Notes* that follow the publication of *39 United States Code Annotated* § 101. There, he will observe that the list of statutory provisions in Title 39 that were either repealed or amended by the 2006 enactment of the Postal Accountability and Enhancement Act<sup>3</sup> does *not* include section 403(a). Thus, the Postal Service's authority under section 403(a) to plan and develop postal products and services continues undiminished and must be read in harmony with the remainder of Title 39, as amended in 2006.

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<sup>3</sup> Public Law 109-435, 120 Stat. 3198 *et seq.*

**B. Petitioner's Flawed View of Former Title 39 Contributes to His Misreading of Current Law**

At page 6 of his December 20<sup>th</sup> Motion, Petitioner argues that his interpretation of current Title 39 is validated because the Postal Accountability and Enhancement Act “explicitly *revoked* unilateral decision-making authority from” the Postal Service.<sup>4</sup> Petitioner’s argument is fatally flawed by the fact that the Postal Service has never had unilateral or exclusive authority under Title 39 to determine the content of the (domestic) Mail Classification Schedule.

Under former 39 U.S.C. § 3623(b), the Postal Service<sup>5</sup> could request that the Commission submit, or the Commission could submit of its own initiative, a recommended decision on changes to the (domestic) Mail Classification Schedule to the Governors of the Postal Service for determination. Thus, for decades before the enactment of the PAEA, the agencies had inter-related roles in the process that determined the content of the Mail Classification Schedule. Accordingly, Petitioner is mistaken when he implies that the enactment of section 3642(a) revoked some unilateral or exclusive Postal Service mail classification authority.

While the enactment of the PAEA changed the roles of the Postal Service and the Commission, both agencies still have inter-related roles in the product development and approval process. Under the current statutory scheme, the

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<sup>4</sup> In a similar vein, Petitioner’s December 23<sup>rd</sup> Addendum at 3 argues that the PAEA nullified any *exclusive* authority of the Postal Service.

<sup>5</sup> Which then was (and continues to be) authorized by section 403(a) to plan and develop postal services.

Postal Service<sup>6</sup> or users of the mail may request, or of its own volition, the Commission may initiate proceedings for consideration of changes or additions to the Mail Classification Schedule. See 39 U.S.C. § 3642(a). Moreover, the explicit recognition of mail user requests in current section 3642(a) merely follows upon the decades-old practice of classification requests being submitted to the Commission for review under former section 3623(b) by the Postal Service, often as a result of product development collaboration initiated by mail users, or the initiation of mail classification dockets by the Commission in response to requests by mail users.

**C. Petitioner's Misreading of Section 401(2) Fuels His Misperceptions**

Petitioner's view of the respective roles of the Postal Service and the Commission appears to spring from his analysis of the 2006 changes to 39 U.S.C. § 401(2). Petitioner argues that these changes reflect that:

Congress intended to *restrict* the USPS, and to subjugate the USPS' ability to control its own rules and regulations to the PRC's authority as well as to the mandates of the PAEA.

Petitioner's December 20<sup>th</sup> Motion at 6-7. A careful examination of the current and former versions of section 401(2) reveals that Petitioner is only half right. Postal Service regulations and Commission regulations have always been subject to the constraint that neither agency's regulations should tread upon the authority of the other agency. The 2006 amendment to section 401(2) did not change that. Former section 401(2) constrained the Postal Service to adopt such regulations as were consistent with its authority under Title 39, as reflected in the

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<sup>6</sup> Acting at the direction of its Board of Governors in accordance with 39 C.F.R. § 3.4(f).

Postal Reorganization Act of 1970 (and subsequent amendments). The current version of section 401(2) uses different wording, but merely again to direct the Postal Service to conform its regulations to its authority under Title 39, as reflected by the passage of the Postal Accountability and Enhancement Act. The only substantive change in 2006 to section 401(2) is the explicit recognition of the need to authorize the Postal Service to adopt rules and regulations implementing some statutes not contained in Title 39. However, nothing in current section 401(2) “subjugates the . . . [Postal Service’s] authority to control its own rules and regulations to the Commission” to any degree beyond the long-standing requirement that postal regulations conform to whatever authority is granted the Postal Service by in Title 39.

A fundamental aspect of Petitioner’s misreading of section 401(2) is exposed in the context of his argument pertaining to the Freedom of Information Act (FOIA) document request he directed to the Postal Service. At page 12 of his December 20<sup>th</sup> Motion, Petitioner asserts that the Commission is authorized by section 401(2) to grant his motion to declare as unlawful the Postal Service’s response to his FOIA fee waiver request. Petitioner’s argument overlooks the most salient feature of 39 U.S.C. § 401: it is a list of the general powers of the *Postal Service*. No portion of section 401 authorizes the Commission to review Postal Service FOIA determinations or to take any specific action at all.

## **II. The Commission's Implementing Regulations Are Consistent With Statutory Scheme**

### **A. The Regulations Recognize The Independent But Interrelated Roles Of Both Agencies**

At page 7 of his December 20th Motion, Petitioner characterizes the Postal Service's October 16th Comments as asserting a claim that it has superior standing under 39 U.S.C. § 3642 to *propose* new products for Commission review. However, the Commission will look in vain for any such claim having been made by the Postal Service. Section 3642(a), as implemented by 39 C.F.R. § 3020, Subpart C, explicitly accords mail users the opportunity to directly petition the Commission to consider initiation of proceedings for the review of mail classification proposals. At 39 C.F.R. §§ 3020.53 through 3020.55, the Commission's implementing regulations reflect its intent to gather relevant information and views from the public, its own Public Representative, and the Postal Service, before determining whether to exercise its discretion in favor of such petitions. In accordance with 39 C.F.R. § 3020.53, the Commission responded to Petitioner's September 18, 2013, *Private Address Forwarding* request by issuing Order No. 1838, which solicits such views.

Petitioner takes issue with 39 C.F.R. § 3020.54 insofar as it reflects the Commission's intent to solicit the "preliminary views" of the Postal Service "in regard to the request and to seek the Postal Service's "suggestions for appropriate Commission action in response to the request." See, Petitioner's December 20<sup>th</sup> Motion at pages 15-16. Petitioner also objects to 39 C.F.R.

§ 3020.55 because it reflects the Commission's intent to consider "whether the proposed modification [to the Mail Classification Schedule] is consistent with the position of the Postal Service as expressed in its reply." *Id.* at 15.

As reflected at pages 15-16 of his December 20<sup>th</sup> Motion, Petitioner argues that these regulations improperly transfer the Commission's section 3642 decision-making authority to the Postal Service and wrongly give the Postal Service the power to veto any Commission preference to review or approve a mail user classification proposal. There is no basis on the face of the regulations for making such assertions, and Petitioner points to no evidence of the expression of any such intent by the Commission during the rulemaking that produced the regulations.

The Postal Service views the regulations differently than Petitioner. On their face, the regulations reflect the Commission's good faith effort to ensure that the Mail Classification Schedule complies with the policies of Title 39, and to harmonize its authority under section 3642(a) in managing the process by which the Mail Classification Schedule is changed with the Postal Service's authority under section 403(a) to plan and develop postal products.

**B. The Commission Has Broad Discretion In Determining Whether To Initiate Review On The Merits**

Where Title 39 prescribes the establishment of or the requirements for a particular mail class or product,<sup>7</sup> or authorizes the Commission to determine that changes are necessary to remedy a finding of unreasonable discrimination

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<sup>7</sup> Such as the requirement in section 404(c) that at least one mail class be maintained for the transmission of letters sealed against inspection.

among mail users,<sup>8</sup> the Postal Service recognizes the Commission's broad authority to act in accordance with section 3642 to pursue changes to the Mail Classification Schedule. In the current context, there is no statutory mandate to create any product bearing any of the characteristics of *Private Address Forwarding*. There is no allegation and no basis for finding that any such product must be established to cure some form of undue discrimination or unreasonable preference within the meaning of section 403(c), or to fulfill any general policy objective in Title 39. Moreover, there is no mandate in Title 39 to implement every postal product concept found to be consistent with general policies found therein. Accordingly, when the Commission receives a mail user petition under section 3642(a) seeking initiation of proceedings to consider establishment of a mail classification or product under such circumstances, the Commission has broad discretion to determine whether to initiate proceedings to consider the merits of the proposal. Contrary to the assertion at page 3 of Petitioner's December 23<sup>rd</sup> Addendum, the Commission is not *required* to initiate proceedings under section 3642 to develop proposals further or simply because a proposal "seems likely" to satisfy the criteria of Title 39. Under 39 C.F.R. § 3020.56(c), the Commission may exercise the option of not going forward with formal proceedings, but is obliged to explain the reasons for that determination.

There is no statutory mandate requiring establishment of a Private Address Forwarding product concept or a finding that such a classification is necessary to remedy a failure to meet one of the general policy objectives of Title

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<sup>8</sup> Within the meaning of section 403(c).



39. In such circumstances, the Commission can elect to give great deference to postal management's exercise of its section 403(a) authority to plan and develop postal products and mail classifications. Petitioner clearly disagrees, as expressed at pages 2-3 of his December 23rd Addendum. However, in the absence of a statutory mandate compelling the establishment of a particular product or a finding, for instance, of unreasonable discrimination, the Commission should exercise restraint. It is the Postal Service's view that the Commission would otherwise be treading improperly upon management's authority if it were to compel the Postal Service to commit the necessary capital resources and re-direct the activities of its Information Technology, Engineering, Network Operations and Marketing departments and adversely impact existing approved and funded projects and timelines underway by these functional organizations for the purpose of determining the feasibility of the Private Address Forwarding concept.

Contrary to the claim at pages 13-14 of Petitioner's December 20<sup>th</sup> Motion, he is not automatically entitled to an application of the substantive criteria listed in section 3642(b) to his new product proposal. The Commission's regulations implementing section 3642(a) recognize that the Postal Service *or any other party* may be in a position to inform the Commission why it should exercise its discretion and decline to initiate proceedings to consider application of the substantive criteria in section 3642(b) to the merits of a specific mail user product concept.

**C. Petitioner Fails To Distinguish The Commission's Substantive And Procedural Determinations**

At page 14 of his December 20<sup>th</sup> Motion, Petitioner highlights the requirement in section 3642(b) that “[a]ll determinations by the . . . Commission under subsection (a) shall be made in accordance with” the specific substantive criteria described or listed in subsections (b)(1) through (3).

The Postal Service concurs with the principle expressed at page 14 of Petitioner’s December 20<sup>th</sup> Motion that “[t]he requirement at this stage of proceedings is lesser.” The parties, however, disagree on the scope of the application of that principle. Contrary to Petitioner, the Postal Service submits that the *determinations* referenced in section 3642(b) are those pertaining to the *substantive* merits of a particular classification proposal, and not the exercise of the Commission’s section 3642(a) *procedural* discretion. Thus, for example, without applying the substantive criteria in section 3642(b)<sup>9</sup> to reach a determination on the merits of a classification proposal, the Commission is authorized to make any of the procedural determinations specified in 39 C.F.R. §§ 3020.55 and 3020.56. The Postal Service disagrees with the proposition that, as prerequisite to rejecting a request<sup>10</sup> or explaining the reasons for not going forward with formal proceedings,<sup>11</sup> the Commission is required to reach a substantive judgment regarding, for example, “the likely impact” that approving or

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<sup>9</sup> And, by implication, section 3622(b) and 39 C.F.R. § 3020.52.

<sup>10</sup> Under 39 C.F.R. § 3020.55(b).

<sup>11</sup> Under 39 C.F.R. § 3020.56(c).

rejecting a classification proposal would have on “small business concerns,” within the meaning of section 3642(b)(3)(c).

**D. Practical Realities Deserve Considerable Weight In The Exercise Of The Commission’s Procedural Discretion**

The Postal Service respectfully submits that the Commission should not utilize its limited resources to initiate proceedings to examine the substantive merits of a mail user product concept under section 3642(a) if the Commission is reliably informed that:

- (a) the technical and operational feasibility of the mail user’s concept would require significant enhancements to current letter, flat, and parcel mail processing equipment, automation recognition technology, and integration of new technology with legacy technologies and systems;
- (b) the Postal Service has no estimate of the cost of procuring and implementing such technology enhancements and systems integration, and has no research indicating whether such investment would provide a positive return on investment;
- (c) the Postal Service has no basis for presently indicating if or when any such capital commitments can be obtained; and
- (d) the Postal Service has not evaluated the time necessary to conduct analysis to determine the feasibility of implementing any such technology enhancements or system integration tools.

Such is the case here. And such circumstances are bound to arise for new product proposals presented for section 3642 review without the benefit of any initial interaction between the proponent and the Postal Service.<sup>12</sup>

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<sup>12</sup> Such circumstances are unlikely ever to arise when mail classification proceedings are initiated under 39 C.F.R. § 3020, Subparts A and B. It is inconceivable that either the Postal Service or the Commission would fail to establish that the Postal Service’s operational capability to provide a particular product existed or was projected to be in place reasonably imminent before seeking consideration of a product proposal under section 3642. Given the historic tendency of mail users interested in the development of specific postal product concepts to first engage the Postal Service directly to become informed about fundamental feasibility issues, and the benefit of such interaction, it is hoped that future 39 C.F.R. § 3020, Subpart C petitions that reflect no such engagement with the Postal Service will be the exception, rather than the rule.

At page 17 of his December 20<sup>th</sup> Motion, Petitioner laments that, unlike other mailers who are presumed to interact with the Postal Service on a daily basis, individuals generally do not have access to decision-makers at the Postal Service.<sup>13</sup> However, in relation to his product concept, Petitioner offers no proof of any attempt to engage the Postal Service or any frustration experienced in submitting any product idea to the Postal Service before filing his September 18, 2013 petition with the Commission.<sup>14</sup>

Due to the many unknown variables that would determine feasibility of such an initiative, the Postal Service offers no judgment on the potential merits of Petitioner's proposal. Notwithstanding the many virtues any product concept might be deemed to possess, if:

- there presently is no basis for concluding that the concept is operationally feasible; and

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<sup>13</sup> The issues and concerns of individual postal customers command significant resources and attention from several headquarters departments on a daily basis. In response to the invitation at page 1 of Petitioner's December 23<sup>rd</sup> Addendum, the Postal Service invites his attention to a channel through which individual customers may present ideas for consideration at [www.usps.com](http://www.usps.com). At the homepage, there is a *Contact Us* link, which opens to a *Customer Service* page, which contains an *Email Us* drop-down menu with a *Suggestion* page. Suggestions recorded here are retrieved by the Consumer and Industry Affairs Department, which routinely forwards them to appropriate headquarters departments for consideration.

<sup>14</sup> Petitioner's failure to direct any inquiry to postal decision-makers appears to stem from a misperception about the Postal Service's authority under section 403(a) to plan and develop postal products and an apparent belief that any such planning and development pertinent to a mail user product proposal occurs only in response to Commission orders issued under section 3642(a). See, Petitioner's December 20<sup>th</sup> Motion at 17, fn. 18. At page 4 of his December 20<sup>th</sup> Motion, Petitioner criticizes what he describes as a lack of effort by the Postal Service to cooperate. For the record, it should be noted that counsel for the Postal Service initiated communication with Petitioner regarding his petition and its October 16<sup>th</sup> Comments, and during the course of a lengthy discussion, offered to provide information with which Petitioner could contact the USPS Vice President for Digital Solutions. As was his right, Petitioner declined that opportunity, choosing instead to submit his Freedom of Information Act request that same evening, and pursue formal discovery in this docket.

-- the technology and systems necessary to assist in such a determination do not exist and their existence is not foreseeable,

it seems imprudent to conclude that further proceedings are warranted in response to a section 3642(a) request. Such is the case here.

At the risk of being redundant, the Postal Service emphasizes that it does not regard it as beyond the realm of possibility that the technology and systems necessary to implement *Private Address Forwarding* could one day exist.<sup>15</sup> And, in proximity to that time, the Postal Service could reasonably be expected to be in a position to assess the operational feasibility of that concept. The Postal Service's development and examination of several product concepts that share similarities with *Private Address Forwarding* reflect that Petitioner is treading on ground familiar to the Postal Service. However, that ground represents only a portion of the Postal Service's efforts to cultivate new and improved product ideas. Multiple product concepts compete at any given time for analytical resources and capital funding. The Postal Service has no basis for projecting when it (or other entities) might develop the technology that may allow it to test the feasibility of PAF or various other product concepts currently under review at Postal Service Headquarters.

If a mailer petitions the Commission under 3642(a) to exercise its discretion to initiate a docket for the purpose of considering whether to consider

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<sup>15</sup> At page 2 of his December 23<sup>rd</sup> Addendum, Petitioner urges the Commission to make a "preliminary determination that his product concept "is of at least plausible feasibility and would likely meet Title 39's requirements and goals." The Postal Service has become acquainted with Petitioner's Private Address Forwarding product concept only in the context of this litigation and has not subjected it to any form of feasibility analysis. If it has not conducted proceedings under 39 C.F.R. §3020.55, it is not clear on what basis the Commission would declare that a product concept was "plausibly feasible" or "likely" to meet the requirements of and satisfy the goals of Title 39. Nor is it clear what purpose such incomplete conclusions would serve.

creation of a new product, it is reasonable for the Commission to make a preliminary assessment of whether initiating such a docket would be a prudent exercise of that discretion. The Commission's authority is sufficiently broad for it, without prejudice, to decline to grant a request based on information regarding whether the Postal Service possesses the capability or the potential to implement the concept, or whether there is any basis for concluding that the concept is even feasible. The Commission preference for making informed judgments and seeking information from its most likely sources is reasonable. Feasibility is relevant and fundamental to the Postal Service's planning and development of postal products under section 403(a). It should likewise be relevant and fundamental to the Commission's decisions in response to requests made under section 3642(a) to exercise its discretion to review a postal product proposal. There is no basis for the implication at page 13 of Petitioner's December 20<sup>th</sup> Motion that declining to institute further proceedings in this docket would be "arbitrary, capricious, unreasonable, an abuse of discretion . . . [or] unwarranted by . . . [the] facts."

### **III. Petitioner's Repeated Claims About Feasibility Are Unfounded**

#### **A. Petitioner Is Mistaken Regarding The Existence of Evidence Supporting The Feasibility Of Various Product Concepts**

Throughout its October 16, 2013 Comments, the Postal Service makes clear that *Private Address Forwarding* shares certain basic features with similar product ideas that have been generated within the agency, and that the existence of these internally-generated concepts gives the Postal Service a clear

view of significant unresolved technical and operational feasibility issues relevant to Petitioner's product concept. All of these related concepts compete for development consideration by postal management, but none has been funded for the in-depth cross-functional feasibility analysis necessary to identify technical and operational barriers to implementation, or the capital investment that would be necessary to overcome such barriers. Moreover, privacy and other policy issues would also need resolution, before addressing such issues as cost, potential demand, pricing, and ultimately potential return on investment. See, USPS October 16<sup>th</sup> Comments at 4-8. Although the Postal Service has yet to analyze the feasibility or merits of these concepts, it also has not ruled out pursuit of determinative feasibility analysis.

Petitioner concedes at pages 8-9 of his December 20<sup>th</sup> Motion that he is "not reasonably able to produce "similar evidence" of the merits and feasibility of his *Private Address Forwarding* concept independently. Be that as it may, the Postal Service possesses no such evidence either, as it has performed no such analysis to support any decision regarding of the feasibility or the merits of that product concept, or for the internally-generated product concepts referenced in its October 16<sup>th</sup> Comments. Accordingly, the Postal Service is challenged in determining how to respond to an unsubstantiated assertion that is repeated in Petitioner's December 20<sup>th</sup> Motion. For example, at page 1 Petitioner asserts that:

there is clear evidence on the record that the United States Postal Service (USPS) has pertinent evidence which would substantially inform the Commission . . . and the public about whether PAF would be feasible . . . .

The Postal Service has been candid from the outset of this proceeding. No such feasibility analysis has been conducted. *Id.* The “relevant evidence” of feasibility that page 2 of Petitioner’s December 20th Motion alleges to be “clear” simply does not exist.<sup>16</sup> Likewise, there is no basis for the assertion at page 2 of Petitioner’s December 20th Motion that the Postal Service has either “referenced” or “implied” the existence of some definitive feasibility analysis. It is not possible for the Postal Service to “put on the record” the results of any analysis that has not been conducted.

On more solid footing at page 13 of his December 20th Motion, Petitioner acknowledges the fact that the Postal Service’s October 16th Comments “raised various questions that would need to be considered” in determining the feasibility of product concepts such as *Private Address Forwarding*. He emphasizes that the Postal Service has “stated no facts that argued against the feasibility of . . . [his] proposal.” The Postal Service has not expressed any definitive conclusion (positive or negative) about the technical or operational feasibility of the PAF concept for the simple reason that it has not conducted the analysis (and is aware of none) which would determine whether postal technology and operating systems (available currently or in the future) would make it feasible to operate or what they might cost.

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<sup>16</sup> It is one thing to conceive of mail service from Earth to Mars and to brainstorm the idea to identify technological components of an interplanetary postal system. It is an altogether different and more complex undertaking to determine the technical and operational feasibility of such a delivery system, before tackling such questions as cost and demand. Evidence that an interplanetary mail system can be conceived, sketched on a whiteboard, or depicted in a schematic drawing should not be confused with evidence of its feasibility.



At page 13 of his December 20<sup>th</sup> Motion, Petitioner emphasizes that the Postal Service has not offered:

any facts materially disputing . . . [his] argument that PAF would substantially benefit the public and the USPS, and fulfill *all* of the requirements in the law.

In the absence of its own in-depth, cross-functional analysis and in response to the utter absence of any information provided by Petitioner, the Postal Service cannot join Petitioner and casually agree that “PAF would substantially benefit the public” and the Postal Service. In the absence of any cost or demand analysis, the Postal Service also will not offer its own unsubstantiated speculation about whether such benefits would exist. The Postal Service has no response to the declaration at page 13 of Petitioner’s December 20<sup>th</sup> Motion that PAF “fulfill *all* of the requirements of the law,” other than to observe that it is as aspirational as it is conclusory.

The Postal Service provided access to documents describing its internally-generated product concepts at page 3 of its October 16<sup>th</sup> Comments. As indicated in Petitioner’s December 26<sup>th</sup> Addendum, the Postal Service has responded to his Freedom of Information Act request by disclosing a detailed schematic depiction of its *Mail My Way* product concept.<sup>17</sup> Narrative descriptions and schematic depictions of an operating concept indicate what operating infrastructure and systems are deemed necessary, and what functions they would need to perform in order for that concept to be feasible to operate. These documents make such concepts easier to visualize. However, they are little

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<sup>17</sup> Inexplicably, these documents did not accompany his December 26<sup>th</sup> Addendum. For the convenience of the Commission, they are attached to the instant motion.

more than detailed representations of an untested idea. Contrary to the wishful thinking that permeates Petitioner's December 20<sup>th</sup> Motion, such schematic drawings are not the equivalent of output of feasibility analysis or an indication that feasibility is around the corner. There remains no basis for Petitioner's insistence at page 8 of his December 20<sup>th</sup> Motion that the Postal Service already has evidence directly relevant to the *merits* of his *Private Address Forwarding* proposal. A schematic drawing of a hypothetical *Mail My Way* operating system does not constitute evidence or a "positive indicator"<sup>18</sup> of that concept's feasibility, or of any other concept's merits or feasibility.<sup>19</sup> To-date, Postal Service concepts like the *Digital License Plate* and *Mail My Way* and Petitioner's *Private Address Forwarding* stand on the same ground as Leonardo da Vinci's legendary *Ornithopter*. Narrative descriptions or sketches exist. However, no analysis has been undertaken yet to definitively resolve whether they can actually fly.

**B. There Is No Correlation Between Precautionary Protection of Intellectual Property Interests And Operational Feasibility**

Petitioner argues at page 13 of his December 20<sup>th</sup> Motion that the Postal Service:

has previously considered similar concepts serious and feasible enough to warrant the considerable time and expense of multiple patent and trademark applications.

As a result, . . . there is a strong inference that my proposal is in fact feasible; there is evidence of evidence readily available to the PRC but not produced for the record; and no material evidence whatsoever on the record.

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<sup>18</sup> Petitioner's December 26<sup>th</sup> Addendum at 4.

<sup>19</sup> Especially when Petitioner takes great pains in his December 26<sup>th</sup> Addendum to emphasize the substantial differences he perceives between *Private Address Forwarding* and *Mail My Way*.

Entities as large as the Postal Service that operate in the commercial world and expend resources toward product development generate numerous product or technology ideas that may not advance far beyond brainstorming and conception. In contrast, some of these concepts may advance to feasibility review that provides a basis for deciding whether or not to invest in product (or technology) development, and pursue regulatory approval and launch. The internal incubation of postal product ideas generates many product concepts and names that are the Postal Service's intellectual property. However, the Postal Service's intellectual property rights are protected only insofar as it expeditiously files for patent, copyright or trademark protection. The prudent and early filing for such protection is a necessary cost of operating in the commercial world, and a relatively small cost if the Postal Service wishes to avoid the adverse financial consequences of misappropriation of its property interests or an allegation later that it has infringed upon another's intellectual property rights.

However, Petitioner should not confuse (a) the Postal Service's routine protection of its intellectual property rights in a concept or name, or its judgment that such an idea or name is "serious"<sup>20</sup> enough to warrant such protection with (b) the more complicated, costly and serious processes of determining the technical or operational feasibility of that concept, or determining its cost or marketability. Contrary to the wishful assertion at page 13 of Petitioner's December 20<sup>th</sup> Motion, the routine protection of intellectual property interests does not create a "strong [or any] inference" that a protected concept is feasible

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<sup>20</sup> Within the meaning of Petitioner's December 20th Motion at 13.

to implement, or that it is a candidate for any degree of feasibility analysis, or that it will (soon or ever) win out in the internal competition among numerous product concepts for scarce postal product research and development resources.

#### **IV. Petitioner's Unfounded Allegations Of Intransigence Create No Favorable Presumption Or Negative Inference**

##### **A. The Postal Service Embraces Innovation**

It appears to be Petitioner's view that the Commission has an obligation under section 3642(a) to advance the development of new postal products and the unfettered authority to command the Postal Service to expend whatever resources and establish whatever product development priorities are necessary to resolve the feasibility of any product concept brought to its attention in the form of a petition filed under 3642(a). In Petitioner's view, the Congressional interest in innovation all but compels the Commission to command the Postal Service to make Private Address Forwarding feasible so that it can be implemented. See, Petitioner's December 20<sup>th</sup> Motion at 17. Petitioner frames any contrary expression by the Postal Service as an "argu[ment] . . . for stagnation; for rejection of new ideas merely because they would (naturally) entail *doing something new.*" *Id.*

There is no basis for attributing any such argument to the Postal Service. If Petitioner's product concept is the standard for "something new," then the Postal Service's alleged aversion to "doing something new" or its "rejection of new ideas" is contradicted by its ongoing examination of the *Digital License Plate* and *Mail My Way* product concepts described in its October 16, 2013 Comments, and

it repeated affirmation that it has not closed the door to further examination of those or similar concepts, or exploration of whether it may be feasible to develop and deploy the technology and systems that would be necessary to implement them.

**B. Petitioner's Expectation Of A Favorable Presumption Is Ill-Founded**

At pages 12-13 of his December 20<sup>th</sup> Motion, Petitioner argues that the Postal Service has, unlawfully and without satisfactory explanation, refused to testify or produce material facts peculiarly within its knowledge, and that such refusal gives rise to an inference that its testimony and evidence, if elicited, would have been unfavorable to its cause. However, the fatal flaw in Petitioner argument is two-fold: (1) he is unable to point to a directive from the Commission that the Postal Service provide testimony or any other form of evidence; and (2) the Postal Service has not failed or refused to comply with any such directive. The only relevant order from the Commission in this docket denied Petitioner's request for discovery. See PRC Order No. 1868 (November 5, 2013). The Postal Service has taken no action contrary to that order.

In a similar vein at page 9 of his December 20<sup>th</sup> Motion, Petitioner argues that the Postal Service has refused to engage in discovery mandated by the Commission's Rules of Practice and Procedure. There, Petitioner references 39 C.F.R. § 3001.25(b), but his reliance on that rule is misplaced. Rule 25(b) encourages parties to engage in informal discovery "whenever possible to clarify exhibits and testimony." However, no testimony or supporting exhibits have been filed in this docket that would be subject to formal discovery under Rules 26 or

28, or to informal discovery as contemplated by Rule 25(b). Accordingly, there is no basis for asserting that the Postal Service has “demonstrated bad faith and repeatedly violated clear law” as Petitioner does at page 9 of his December 20<sup>th</sup> Motion.

Likewise, there is no basis for the pejorative characterizations of the Postal Service’s October 28<sup>th</sup>, 2013 reply to Petitioner’s October 21, 2013, Motion For Discovery. See, Petitioner’s December 20<sup>th</sup> Motion at 9. The Postal Service’s references to the various internally generated product concepts such as *Digital License Plate* and *Mail My Way* in its October 16<sup>th</sup> Comments was based on searches of public records filed and publicly available at the U.S. Patent and Trademark Office. At the time of its October 28<sup>th</sup> response to Petitioner’s discovery request, the Postal Service had not conducted a search for internal records that might be responsive to his discovery request. At that time, the Postal Service could only surmise that such records *might* exist and be somewhere in its possession. It would have been imprudent, irresponsible and – most of all -- misleading for the Postal Service at the time to have represented either the existence or non-existence of responsive internal documents, when it has no basis for providing any such conclusive indication. The Postal Service’s objection to discovery was not a tactic for withholding known documents from disclosure, but based on the principle that any inquiry regarding the existence or availability of such records or information should be reserved until after such time as the Commission has determined if it will conduct further proceedings under 39 C.F.R. § 3020.56 and, if so, has elected between narrowly crafted information

requests from the Presiding Officer or some less efficient method for obtaining information necessary for its resolution of this docket.

**C. No Negative Inference Arises From Petitioner's Frustration With The Status Of His FOIA Request**

At page 16 of his December 20th Motion, Petitioner asserts that the Postal Service has refused to disclose information that is clearly material to his proposal, which can be reasonably inferred to be unfavorable to its claims. It is assumed that the alleged refusal is the Postal Service's December 12, 2013 final agency decision in response to his November 25, 2013, request for a waiver of search fees applicable to his October 18, 2013 Freedom of Information Act (FOIA) request.<sup>21</sup>

The Commission will observe that Petitioner has not yet been denied access to any postal records in response to his FOIA request. He has been denied an FOIA fee waiver and has, thus far, declined to modify the scope of his broad information request to limit applicable fees or pay for any records search that would exceed the two free hours of search time allotted by 39 C.F.R. § 265.9(c)(4). The December 24<sup>th</sup> correspondence accompanying Petitioner's December 26<sup>th</sup> Addendum reflects that, in connection with its obligation to conduct two hours of free search, a search of the files of the USPS Product Information Department produced 14 pages of records, all of which were deemed to be subject to disclosure under the FOIA and provided to Petitioner. Upon payment of applicable fees, the Postal Service will search to determine if

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<sup>21</sup> Copies of the aforementioned correspondence between Petitioner and the Postal Service accompany Petitioner's December 20<sup>th</sup> Motion.

additional records exist, and if any are exempted from disclosure. Thus, it is not accurate for Petitioner to assert or imply that the Postal Service has refused to disclose information to-date in response to his FOIA request.<sup>22</sup>

The answer to the question of whether Private Address Forwarding is technologically or otherwise feasible is unknown to the Postal Service. Contrary to the inference at page 16 of Petitioner's December 20th Motion, the Postal Service has no "desired position" regarding the answer to that question. Future technological developments affecting not only PAF, but several of the Postal Service's own product concepts that pre-date or are contemporaneous with it may one day provide an answer.<sup>23</sup> Moreover, it is not clear what purpose would be served in a section 3642 classification docket by imposing a punitive negative inference in response to the Postal Service's lack of knowledge regarding the technological or operational feasibility of the PAF concept. It would be seem at least highly questionable for the Commission to punitively presume a concept feasible or infeasible and determine the fate of a section 3642 docket on such a basis.

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<sup>22</sup> Should the fee question be resolved in a manner that generates additional records searches, there is always the possibility that records (or portions thereof) within the scope of the request may be exempted from mandatory public disclosure under 5 U.S.C. § 552(b).

<sup>23</sup> It is hoped that the mischaracterizations of the Postal Service's views in Petitioner's December 20th Motion at page 5 ("we don't want to"), at page 15 ("unless the USPS itself proposes a change, it should not be seriously considered") and page 16 ("not invented here") are not a disingenuous attempt to mislead, but merely reflect a less than careful reading of the Postal Service's pleadings in this docket.



## **V. Further Proceedings In This Docket Are Not Warranted**

### **A. There Has Been Ample Opportunity For Public Comment**

Petitioner's December 20<sup>th</sup> Motion requests that the Commission exercise its authority under 39 C.F.R. §§ 3020.55 and 3020.56 to institute further proceedings. The Commission's rules implementing section 3642 reflect its very reasonable preference for making judgments in a logical and economical manner. If the establishment of a material threshold fact early in the petition review process makes it imprudent for the Commission and interested parties to squander resources examining product concepts divorced from the reality of feasibility, that fact should weigh heavily in the Commission's procedural determination. Further proceedings should not be commenced when it is clear that they would only serve the purpose of circling along a meandering trail back to an earlier-established dead end.

At page 2 of his December 20<sup>th</sup> Motion, Petitioner argues for the institution of further proceedings for the public to comment on the feasibility and desirability of his proposal. With all due respect, the public was afforded that opportunity by PRC Order No. 1838 (September 23, 2013), as amended by PRC Order No. 1858 (October 23, 2013). Comments were filed by one other individual, a mailer trade association, and the Public Representative on October 18, 2013.

### **B. Plaintiff's Enumerated Requests For Relief Should Be Denied**

#### **1. Request Numbers 1 through 6 and Number 9 have been addressed.**

Petitioner moves for various forms of specific relief from the Commission that are enumerated on pages 2-3 of his December 20<sup>th</sup> Motion. To a great

extent, the discussion in the preceding sections of the instant pleading and the Postal Service's December 20<sup>th</sup> Comments explain why such relief is not warranted. Accordingly, in the (belated) interest of brevity, the Postal Service will not respond to each of the enumerated requests for relief, but will limit its comments below to matters not addressed above.

**2. Request Number 7 should be denied.**

Petitioner's request Number 7 for discovery should be denied. Rather than confine his discovery request to any records relating to the threshold issue in this proceeding, the feasibility of his Private Address Forwarding proposal, Petitioner seeks discovery for the purpose of reversing the impact of his preference not to pay the search fees associated with the Freedom of Information Act request discussed above in section IV.C. The five categories of records at issue from Petitioner's FOIA request are summarized at pages 2-3 of Petitioner's Motion for PRC Order Of Disclosure Of Related Documents (October 18, 2013).

**a. Information Categories 1, 2 and 5.**

With respect to Information Category 1, it bears emphasizing that the only existing responsive documents pertaining to *Private Address Forwarding* are those that have been filed in this docket, since the "investigation" of the concept has consisted of preparing responses to pleadings filed in the instant docket.<sup>24</sup>

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<sup>24</sup> The Postal Service regards any records reflecting communications between agency counsel and managers associated with the preparation of such pleadings to be protected from discovery by the attorney-client privilege. Otherwise, as has been made abundantly clear, there has been no "investigation" of the factors identified in Category 1 in relation to Petitioner's product concept.

For the same reason, no documents pertaining specifically to Petitioner's product concept exist within Categories 2 through 5.

Since the Postal Service has not yet conducted feasibility analysis to resolve technical and operational issues related to such concepts as *Digital License Plate* and *Mail My Way*, it stands to reason that documents relating uniquely to the "feasibility or technical standards for records storage systems for such proposals" would not exist. FOIA requesters are entitled, nevertheless, to ask that searches be conducted for records they believe to exist, subject to the Postal Service's regulations governing applicable fees. It would seem an abuse of the Commission's discovery rules if they were utilized to circumvent having to compensate the Postal Service under the FOIA for such a search.

**b. Information Categories 3 and 4.**

With respect to Information Categories 3 and 4, it is not clear whether, as an alternative to demanding records under the FOIA or that the Commission intervene in resolving his FOIA appeal, Petitioner has availed himself of publicly available information that also may be relevant. The Privacy Act (5 U.S.C. § 552a) safeguards for the Post Office Box records systems and other postal records systems containing "identities and street addresses of individuals" are published in USPS Handbook AS-353.<sup>25</sup>

**c. Information Categories 2 and 5.**

Information Categories 2 and 5 seek access to information that would reveal the day-to-day pre-decisional deliberations of senior postal managers. Of particular interest to Petitioner appear to be those managers responsible for

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<sup>25</sup> This link may prove useful: <http://about.usps.com/handbooks/as353.pdf>.

assessing product concepts and determining which of those merit priority at any given time for feasibility analysis or other internal investigation, and the relative status of concepts in relation to one another in that regard. As the Public Representative astutely emphasized at page 5 of its October 18<sup>th</sup> Comments, public disclosure of such pre-decisional deliberations -- and judgmental assessments of which projects to prioritize and why -- would only serve to chill the internal pre-decisional deliberative process. As a consequence, managers would be discouraged from freely exchanging opinions and recommendations about the relative merits of various projects competing for access to scarce analytical resources. The resulting degradation in decision-making would hamper the product development process.

In addition, the pre-decisional public disclosure of the nature of product concepts under consideration could provide postal competitors with commercially valuable insight regarding pre-emptive measures to pursue to preserve or enhance market share in anticipation of postal product launches. In both ways, the Postal Service would suffer economic injury of the type that 39 U.S.C. § 504(g)(3)(A) is intended to prevent. Moreover, information about the relative status of every product concept currently under consideration is not necessary to resolve the question presently before the Commission of whether further proceedings under 39 C.F.R. §§ 3020.55 and 2020.56 are warranted at this time in connection with the Private Address Forwarding concept.

**3. No grounds have emerged for considering use of the Commission's subpoena power.**

Insofar as the Commission determines that specific additional information from the Postal Service may be necessary to a resolution of the narrow issue of whether further proceeding are warranted, the Postal Service considers that there is a superior alternative to Petitioner's alternative demands for far-ranging discovery and the issuance of subpoenas.<sup>26</sup> It is the view of the Postal Service that a narrowly crafted Presiding Officer's Information Request (POIR) would be a more effective method of producing relevant and necessary information than reliance of the development of such information by less efficient means, such as discovery. Moreover, the Postal Service's history of diligent response to POIRs has proven that reliance on subpoenas to routinely obtain information is unnecessary.

**4. It is premature to address request Numbers 10 and 11.**

Petitioner's request Number 10 for permission to remotely attend all "meetings" related to his request references 39 C.F.R. § 3001.43. That rule governs the Commission's meetings which, if open, may be attended by members of the public as non-participating observers; however, if such meetings are closed, the public is not permitted to attend. Meetings governed by Rule 43 are distinct from hearings or conferences conducted as part of a docketed Commission proceeding, in which interested parties may participate. See, e.g., 39 C.F.R. §§ 3001.18, 3001.19, 3001.24 and 3001.30. Accordingly, the Postal Service assumes that Petitioner has such conferences and hearings in mind in

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<sup>26</sup> Requests for relief Numbers 7 and 8, respectively.

conjunction with request for relief Number 10. The rules governing these proceedings do not explicitly address the issue of remote participation.

Presumably, good cause would need to be shown to the Commission in order to warrant such accommodation. No cause has been offered in support of Petitioner's Request, depriving the Postal Service of any opportunity to express either unconditional support or the basis for any reservation.

With respect to Petitioner's request Number 11, the same considerations apply. As oral argument is only rarely exercised in Commission proceedings, the Postal Service respectfully reserves the right to comment on such a request if and when made in conjunction with the filing of briefs, the contents of which would weigh heavily on the question of whether a request for such argument should be requested or granted, or how it should then be conducted.

## **VI. Conclusion**

With respect to development of Private Address Forwarding or other similar concepts currently being championed within the agency, the Postal Service sees considerable technological and operational challenges. Other similar challenges also affect numerous other product concepts and influence the choices the Postal Service regularly makes as it exercises its duty to plan and develop postal products. Revelation of such challenges is part of the Postal Service's duty to inform the Commission regarding the exercise of its discretion to consider mail classifications requests under section 3642(a).

It is not the expectation or goal of the Postal Service that it be the petitioner in every section 3642 docket. Under appropriate circumstances, the Postal Service looks forward to supporting future section 3642 mail user petitions. At the same time, it is unrealistic for any mail user to believe that section 3642 prohibits the Commission from reasonably exercising its discretion under section 3642 on the basis of the views expressed by any and all who appear before it, including the Postal Service. The Postal Service has no illusion of exercising any form of veto power, but considers itself the first among the many equals whose views the Commission solicits.

For the foregoing reasons, the Commission should deny Petitioner's request in this docket.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

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